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Supreme Court, U.S.
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No. 03-1566

IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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The opposition briefs filed by respondents Bureau of Reclamation and NRDC intervenors make one main, as well as a dozen other, new points. Section 1 of this brief replies to the main point, and Section 2 replies succinctly to each of the others.

1. THE CONFLICT BETWEEN THE FEDERAL AND NINTH CIRCUIT CASES IS NEITHER NON-EXISTENT NOR ILLUSORY

Respondents main new point is that there is "no conflict" between the Federal Circuit's 1984 *H.F. Allen Orchards* decision and the Ninth Circuit's *Orff* decision below. U.S. Brief at 6, 11; NRDC Brief at 12. NRDC adds that any split between the two circuits is "illusory." NRDC Brief at 1, 11, 13. This point lacks merit.

The Bureau argues at the most general level of the law that there is no conflict, because both the Federal and Ninth circuits apply the "same well-established contract law principles." U.S. Brief at 6, 8, 10, 11. Both circuits, it asserts, examine whether the parties to a contract have expressed a "clear intent" to benefit the plaintiff. *Id.* at 7, 8. NRDC also so argues, claiming that both circuits apply the "same legal standard" of clear intent. NRDC Brief at 1, 11, 12, 13, 15.

In addition, at the most specific level of the facts, the Bureau claims that the outcome in *Orff*, compared to *H.F. Allen Orchards*, "reflects differences in the particular facts" and that petitioners challenge a "case-specific determination" relating to the application of the rules to the facts. U.S. Brief at 6, 11. NRDC similarly argues the two cases are "factually distinguishable" and petitioners merely seek a "fact-bound" correction of the application of rules to facts. NRDC Brief at 1, 11, 12, 13, 15.

Most federal contract cases involve a search for the intent of the parties.[1] And no contract dispute is identical in all factual respects to any other.[2] But the two assertions made by respondents at the margins of the question presented miss the great middle ground where the two cases were decided and where they directly conflict.

The facts *H.F. Allen Orchards* deemed legally relevant to determine the intent of the parties were twofold. First, the farmers "have a property right in the water to the extent of their beneficial use," "ultimately pay for" the water, and are "the true parties in interest." 749 F.2d 1571, 1576 (Fed. Cir. 1984). Second, their irrigation district acts as "a surrogate for the aggregation of farmers." *Id.* The Court did not deem an irrigation district to be a general-purpose government, nor a farmer to be a member of the public.[3] It did not, therefore, presume that the farmers were incidental third-party beneficiaries. And, accordingly, it did not parse the contracts at issue to find a clause stating explicitly that the farmers were intended beneficiaries entitled to sue the Bureau.

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[1] The eponymous purpose of the clear intent principle or standard in the instant context is to ascertain whether the third-party beneficiary is intended, or incidental. This was the task of the Federal Circuit in *H.F. Allen Orchards.* 749 F.2d at 1576 (farmers were "intended" beneficiaries). This is also the focus of the Ninth Circuit's inquiry in *Orff.* Appendix A at 9a, 10a, 11a, 14a.

[2] The repayment contracts at issue in *H.F. Allen Orchards,* and certain of their terms, are described in some detail in two published decisions. 749 F.2d at 1573, *reversing in relevant part* 4 Cl.Ct. 601, 603, 604, 608, 612 (1984). Two provisions of the service contract construed in *Orff* are similarly described in detail. Appendix A at 11a-14a. While the terms of the reclamation contracts in the two cases are not identical, they are indistinguishable in material respects.

[3] Respondents do not contest petitioners' showing that, based on this Court's jurisprudence, an irrigation district is not a general-purpose government. Petition at 4-5 n.6, 27.

The rules applied below in *Orff* to ascertain intent are in direct conflict. *Orff* starts with a "presumption" of incidental status. Appendix A at 15a n.5. It is so "presumed," applying Section 313(2) of the *Restatement (Second) of Contracts*, by characterizing an irrigation district as a "government" and its farmers as "individual members of the public." *Id. at* 10a. The Court concludes that the two sections of the 1963 contract it construed were not sufficient to "rebut" the presumption of incidental status. *Id.* at 15a n. 5. Acknowledging that the 1963 contract was made by the Bureau and the Westlands Water District with the farmers "in mind" and that it operates to their "benefit," *Orff* holds that such facts are "not enough" to find intended status. *Id.* at 14a, 15a n. 5.

Thus, the operative rules applied by the two circuit courts to determine the intent of the contracting parties and the status of the farmers were totally different, as were the facts each court found legally relevant to that inquiry. On this decisive ground, *H.F. Allen Orchards* and *Orff* are in direct conflict, and the two circuits are unmistakably split.

If the Bureau and NRDC see no conflict between *H.F. Allen Orchards* and *Orff*, and no split in the Federal and Ninth circuits, the Ninth Circuit, itself, has little doubt about such division. It explicitly notes *Orff* may be "at odds" with *H.F. Allen Orchards.* Appendix A at 14a n.5. The Federal Circuit, it acknowledges, "did not . . . examine any contract language." *Id.* In contrast, "the law in [the Ninth] circuit requires an examination of the precise language of the contract." *Id.* at 15a n.5. The *Orff* opinion concludes that, to the extent *H.F. Allen Orchards* "employs a different approach and reaches a different result, we respectfully disagree." *Id.*

Accordingly, the Bureau's related assertions—that *H.F. Allen Orchards* "did not categorically hold" that all irrigators are intended beneficiaries of reclamation contracts, and *Orff* "did not hold categorically" that all are incidental—do not warrant acceptance by the Court. U.S. Brief at 9. All

irrigators suing the Bureau in the Federal Circuit under their district's reclamation contract have standing there, because they are always "the true parties in interest" and their district is always their "surrogate." 749 F.2d at 1576. Conversely, every farmer suing in the Ninth Circuit will hereafter be denied standing, as surely no reclamation contract contains "precise language" manifesting a clear intent to "make farmers intended beneficiaries" and grant them "enforceable rights." Appendix A at 11a, 14a, 15a n.5. The two sets of operational rules applied by they two circuits are, indeed, categorical—and irreconcilable.

2. THE OTHER NEW POINTS RAISED BY RESPONDENTS LACK MERIT

Respondents make four other points about *H.F. Allen Orchards,* which are replied to in paragraphs (a), (b), (c), and (d) below. NRDC makes three points about *Orff*, which are rebutted in (e), (f), and (g). Paragraphs (h) and (i) reply to new points made about 43 U.S.C. § 390uu. And paragraphs (j), (k), and (l) below rebut NRDC policy arguments relating to the importance of the question presented.

(a) The Bureau asserts that *H.F. Allen Orchards* "did not involve a reclamation contract at all," but only a consent decree and alleged implied contracts. U.S. Brief at 9. NRDC makes the same point. NRDC Brief at 13. In fact, the districts there had signed repayment contracts which incorporated or gave rise to the others. 4 Cl.Ct. at 603, 604, 607, 608, 612.

(b) The Bureau argues that *H.F. Allen Orchards* has "limited value as a precedent." U.S. Brief at 9 n.2. Specifically, it claims the Federal Circuit "assumed that the irrigators had a property right under Washington State law to the water" and that such assumption is "incorrect" after *Department of Ecology v. Bureau of Reclamation,* 827 P.2d 275, 281 (Wash. 1992). *Id.* at 10 n.2. This point is incorrect for two reasons. First, *H.F. Allen Orchards* cited *Fox v.*

Ickes, 137 F.2d 30 (D.C. Cir. 1943), for the proposition farmers had a property right in the water. 749 F.2d at 1576. *Department of Ecology* in no way assails *Fox.*[4] Second, the farmer's claim in *Department of Ecology* arose in a role analogous to that of NRDC here. He had unsuccessfully attempted to appropriate—without having any contract or making any payment—the previously appropriated project water which flowed through a stream on his property. Accordingly, *Department of Ecology* has no salience here.

(c) NRDC argues there is an "intra-circuit split" between *H.F. Allen Orchards* and *Montana v. U.S.,* 124 F.3d 1269 (Fed.Cir. 1997) and that, therefore, any "ambiguity" in *H.F. Allen Orchards* should be construed to eliminate the split between it and *Orff.* NRDC Brief at 15. *H.F. Allen Orchards* is not ambiguous. *Montana* has nothing to do with a reclamation contract between the Bureau and an irrigation district and, therefore, in no way contradicts *H.F. Allen Orchards.* 124 F.3d at 1273-74 (state, as trustee for injured workers, is not intended beneficiary of settlement agreement between Commodity Credit Corporation and lenders of a bankrupt sugar company).

(d) NRDC argues the Court should "await further clarification" of *H.F. Allen Orchards* in *Klamath Irrigation District v. U.S.,* now pending in the Court of Federal Claims, which "may" provide the Federal Circuit with an opportunity to consider "any tension" in its own case law. NRDC Brief at 15 n.5. Again, there is no "tension" in the Federal Circuit, and there is no need for "clarification" of *H.F. Allen Orchards.*

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[4] Indeed, *Fox* is unassailable. It derived from this Court's decision in *Ickes v. Fox,* 300 U.S. 82, 95 (1937), which has been powerfully affirmed in subsequent cases. *Nebraska v. Wyoming,* 325 U.S. 589, 614 (1945); *Nevada v. U.S.,* 463 U.S. 110, 116 (1983).

(e) NRDC attempts to distinguish *Orff* from *H.F. Allen Orchards* by asserting that, here, the Bureau "holds the associated property interest in its own name" and "owns the water rights at issue," citing principally D-1641, a 2000 decision of California's State Water Resources Control Board. NRDC Brief at 13-14. Respondents are precluded from making this argument, because it was finally decided against them in *Tulare Lake Basin Water Storage District v. U.S.*, 49 Fed.Cl. 313 (2001), which arose from the very water reallocations involved in *Orff*. The court held that the contractors had the right to use the permitted and contracted quantity of water. *Id.* at 318. It held that in 1978 the state board had determined in D-1485 that the full protection of salmon and smelt was "not ultimately in the public interest." *Id.* at 324. That decision "specifically allowed" for full contract performance. *Id.* at 321. D-1485 defines the scope of contractors' "property rights" and "contract rights." *Id.* at 322. In any event, D-1641, itself, does not support the propositions for which NRDC cites it. The Bureau's interest in the water rights under permits is simply "title." 1996 WL 1678482 at *83, *85. The U.S. intended to operate in the early 1990s in a way that caused shortages to contractors "whether or not" the state board approved the permit changes in 2000. *Id.* at *81. Most importantly, D-1641 did not decide any disputes between the U.S. and its contractors, including those at issue here. *Id.* at *85.

(f) NRDC also cites *Ivanhoe Irrigation District v. All Parties*, 53 Cal.2d 692 (1960), for the proposition that the Bureau does not hold the water rights for petitioners. NRDC Brief at 14-15 n.4. That case validated similar reclamation contracts, recognizing that the Bureau had the power to obtain the water rights necessary to perform them. 53 Cal.2d at 715-16. In no way does it negate farmers' rights under such contracts.

(g) NRDC asserts that "a prior judgment bars the relief petitioners seek and resolution of the question presented in favor of petitioners is thus unlikely to affect the ultimate outcome of this case." NRDC Brief at 12. It explains: "The ultimate merits question at issue – whether the United States violated a contractual obligation to petitioners in 1993 – was finally adjudicated against petitioners almost ten years ago in *O'Neill v. U.S.*, 50 F.3d 677, 689 (9th Cir. 1995)." *Id.* at 18. This assertion is irrelevant to the question presented. It is also incomplete and wrong. It is incomplete, because it says nothing about the farmers' overcharge claims. It is wrong as to their underdelivery claims, because the district court in that case and the instant case has never ruled on whether the U.S. complied with, or violated, federal statutes when it effected the water reallocations in question. *O'Neill*, 50 F.3d at 680, 682, 687-89; Appendix A at 4a, 5a.

(h) Respondents state that 43 U.S.C. § 390uu, enacted in 1982, specifically designates "contracting parties" as parties with standing to sue. U.S. Brief at 8; NRDC Brief at 9. In fact, the statute authorizes suits to adjudicate "the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." Appendix D. If farmers are intended third-party beneficiaries of their district's reclamation contracts, then they can sue to adjudicate the rights of the district thereunder, as even the Court of Appeal below acknowledges.[5]

(i) The Bureau cites two cases for the proposition that, if petitioners have standing, 43 U.S.C. § 390uu waives immunity "for declaratory relief, but not for money damages

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[5] Congress intended to authorize suits by parties to reclamation contracts "or beneficiaries" thereof. S. Rep. No. 373, 97th Cong., 2d Sess. 18 (1982), reprinted in 1982 U.S.C.C.A.N. 2570, 2582. House members intended that suits could be brought thereunder by a district or "the people in it" or its "members" (Rep. Kazen) or by "the farmers" (Rep. Clausen). 128 Cong. Rec. 8816, 8817 (1982).

suits." U.S. Brief at 11-12 n.4. Neither case it cites so holds. In any event, Westlands farmers have prevailed against the Bureau on this issue. *Sumner Peck Ranch, Inc. v. Bureau of Reclamation,* 823 F.Supp. 715, 746-47 (E.D. Cal. 1993) (statute authorizes suit for money damages against Bureau for breach of 1963 contract); see also *U.S. v. Westlands Water District,* 134 F.Supp.2d 1111, 1156 n.97 (E.D. Cal. 2001) (statute authorizes suit to recover interpled funds under recordable contracts between the Bureau and excess landowners in Westlands). The Bureau is precluded from asserting this argument against Westlands farmers. *U.S. v. Stauffer Chemical Co.,* 464 U.S. 165, 170-71 (1984).

(j) NRDC states that the issue presented has "arisen only infrequently" in the past, and there is a "paucity of case law" on the question. NRDC Brief at 17. Yet, NRDC also argues that affirming *H.F. Allen Orchards,* which has been the sole authority for 20 years, would subject the Bureau to "innumerable" suits and, therefore, would be "unworkable." *Id.* at 19. The question of how often farmers will sue the Bureau if certiorari is granted and the judgment is reversed is best answered by examining the historical record. Before 1984, the district courts occasionally entertained suits by farmers against federal reclamation officials. *E.g., Ickes,* 300 U.S. at 96-97; *Fox,* 137 F.2d at 35-36; *Barcellos & Wolfsen, Inc. v. Westlands Water District,* 491 F.Supp. 263 (E.D. Cal. 1980). Since 1984, one district court has decided on the merits several contract suits brought by Westlands farmers against the Bureau. *E.g., Barcellos & Wolfsen, Inc. v. Westlands Water District,* 899 F.2d 814 (9th Cir. 1990); *Sumner Peck Ranch,* 823 F.Supp. at 745-48; *O'Neill,* 50 F.3d at 682-87; *U.S. v. Westlands,* 134 F.Supp.2d at 1134-54. There is no basis for assuming that districts in the future will be more or less prepared to protect their farmers, or that farmers will be more or less prepared to sue the Bureau. On the other hand, recent events suggest that contract suits by both districts and farmers against the Bureau may hereafter increase for other

reasons—new Congressional legislation, revised executive branch policies, and intensified interest group pressures. Petition at 23.

(k) NRDC asserts that "irrigation districts generally represent their landowners' interests quite aggressively."[6] NRDC Brief at 16. But this was not true in the above-cited cases, nor in either *H.F. Allen Orchards* or *Orff.* It is such cases that make review by this Court of the question presented important.

(l) Finally, NRDC asserts that "the District has shown no reticence in litigating on petitioners' behalf," citing 11 published cases. NRDC Brief at 16. It further asserts that Westlands has "represented petitioners' interests forcefully, through frequent forays to the courthouse." *Id.* Nine of the cases NRDC cites are irrelevant, and two are only marginally so. Two such suits were against pipe suppliers. *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013 (11th Cir. 1992); *Westlands Water District v. Amoco Chemical Co.*, 953 F.2d 1109 (9th Cir. 1991). Two involved disputes with environmental groups. *Westlands Water District v. U.S.,* 700 F.2d 561 (9th Cir. 1983); *Westlands Water District Distribution District No. 1 v. NRDC,* 276 F.Supp.2d 1048 (E.D. Cal. 2003). Four were disputes between Westlands and other water districts over priority of allocation in water-short years. *Del Puerto Water District v. Bureau of Reclamation,* 271 F.Supp.2d 1224 (E.D. Cal. 2003); *Westlands Water District v. U.S.,* 337 F.3d 1092 (9th Cir. 2003); *Westlands Water District v. U.S.,* 100 F.3d 94 (9th Cir. 1996); *Westlands Water District v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993). And in one the Bureau sued Westlands for money, Westland countersued its farmers and interpled the funds, and the farmers

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[6] Respondents do not contest petitioners' showing of doubt that districts have the requisite standing and incentive to recover farmers' damages. Petition at 24.

litigated with the Bureau on the merits. *U.S. v. Westlands,* 134 F.Supp.2d at 1122-23. The final two cases cited by NRDC were suits by Westlands against the Bureau to protect part of its water supply. However, one sought temporary relief as to a small amount of water. *Westlands Water District v. NRDC,* 43 F.3d 457 (9th Cir. 1994). The other relates to a similarly small quantity of water. *Westlands Water District v. Department of Interior,* ____ F.3d ___, 2004 WL 1558290 (9th Cir.); Record of Decision, www.arcata.fws.gov/fisheries/report/treis/ROD12-19-00(b).pdf, at 20. But where was Westlands when its farmers were seriously harmed by the Bureau? As evidenced by the cases cited in paragraph (j) above, when rates were increased, the farmers were on their own. When the Bureau reallocated half their water to the Ocean, they were, again, alone. And when they were not provided with drainage, the farmers had to sue both the Bureau and Westlands. Furthermore, in the case at bar, Westlands and its farmers were allies against the Bureau at the outset, but Westlands dropped out shortly thereafter, again leaving its farmers to fend for themselves. Appendix A at 4a.

Respectfully submitted,

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